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Emily B Caudill REGULATIONS COMPILER

1 FINANCE AND ADMINISTRATION CABINET

2 Department of Revenue

3 (Amendment)

4 103 KAR 27:220. Restaurant [~~Miscellaneous restaurant~~] transactions.

5 RELATES TO: KRS 91A.400, 139.010, [~~91A.400,~~] 139.200, 139.210, 139.260, 139.270,  
6 139.290, 139.310, 139.330, 139.480, 139.485

7 STATUTORY AUTHORITY: KRS 131.130[~~(+)~~], 139.710

8 NECESSITY, FUNCTION, AND CONFORMITY: KRS 131.130(1) authorizes the  
9 Department of Revenue to promulgate administrative regulations necessary for the assessment,  
10 collection, refunding, administration, and enforcement of [~~all tax laws in~~] Kentucky tax laws. This  
11 administrative regulation establishes the sales and use tax requirements for miscellaneous  
12 transactions relating to restaurants.

13 Section 1. Definitions. (1) "Food and food ingredients" is defined by [~~in~~] KRS 139.485(2).

14 (2) "Mandatory gratuity" means a gratuity or tip charged by a restaurant. An example of a  
15 mandatory gratuity is a gratuity charge made by a restaurant for serving a large number of  
16 customers in a single group.

17 (3) "Prepared food" is defined by [~~in~~] KRS 139.485(3)(g).

18 (4) "Voluntary gratuity" means a gratuity or tip not required by a restaurant but willfully added  
19 by a customer.

20 Section 2. (1) Tax shall apply to any charge added to the price of prepared food by a restaurant,  
21 including a mandatory gratuity, service charge, surcharge, or fee itemized on the



1 invoice or ticket to the customer by the restaurant. These charges shall be considered part of the  
2 selling price of prepared food.

3 (2) A voluntary gratuity left by the customer shall not be subject to tax. [~~A gratuity not required~~  
4 ~~by the restaurant but willfully added by the customer shall be considered voluntary.~~]

5 Section 3. A restaurant employee shall pay tax on the sales price of any prepared food or other  
6 taxable item purchased from the employer.

7 Section 4. (1) Taxable tangible [~~Tangible~~]personal property shall be subject to sales and use  
8 tax based upon the restaurant's purchase price if the property was:

9 (a) Purchased exempt from tax under a Resale Certificate (Form 51A105) or a Streamlined  
10 Sales and Use Tax Agreement - Certificate of Exemption (Form 51A260)[~~both incorporated by~~  
11 ~~reference in 103 KAR 3:020~~]; and

12 (b) Provided free of charge to employees or customers, or otherwise used or consumed by the  
13 restaurant.

14 (2) Food and food ingredients and prepared food donated by a restaurant to charity shall not  
15 be subject to the tax.

16 Section 5. The tax imposed by a city on a restaurant pursuant to KRS 91A.400 shall be  
17 classified as a license tax that when passed on to customers shall constitute gross receipts subject  
18 to sales tax according to the provisions of KRS 139.010.

19 Section 6. (1) This administrative regulation shall replace Revenue Circular 51C001-S2 and  
20 Revenue Policy 51P345.

21 (2) Revenue Circular 51C001-S2 and Revenue Policy 51P345 are hereby rescinded and shall  
22 be null, void, and unenforceable.

23 Section 7. Forms. The forms listed herein may be inspected, copied, or obtained, applicable

1 copyright law, at:

2 (1) The Kentucky Department of Revenue, 501 High Street, Frankfort, KY 40601;

3 (2) A Kentucky Taxpayer Service Center, Monday through Friday, 8:00 a.m. to 4:30 p.m.; or

4 (3) The department website at <http://revenue.ky.gov>.

103 KAR 27:220

APPROVED BY AGENCY:

*Daniel Bork*  
DANIEL P. BORK, COMMISSIONER  
Department of Revenue  
Finance and Administration Cabinet

*Sept 12, 2019*  
Date

## PUBLIC HEARING AND PUBLIC COMMENT PERIOD

A public hearing on this administrative regulation shall be held on November 21, 2019, at 10:00 a.m. in Room 9B, State Office Building, 501 High Street, Frankfort, KY 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through November 30, 2019. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

**CONTACT PERSON:** Lisa Swiger, Tax Policy Research Consultant II, Department of Revenue, 501 High Street, Station 1, Frankfort, Kentucky, 40601, (502) 564-9526 (telephone), (502) 564-3875(fax), [Lisa.Swiger@ky.gov](mailto:Lisa.Swiger@ky.gov) (email).

## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation No. 103 KAR 27:220

Contact Person: Lisa Swiger

Phone Number: (502) 564-9526

Email: Lisa.Swiger@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation interprets the sales and use tax law as it applies to miscellaneous restaurant transactions.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to provide up to date guidance on the tax treatment of miscellaneous restaurant transactions.

(c) How this administrative regulation conforms to the content of the authorizing statutes: The proposed amendment updates regulatory language to conform with KRS 131.130 and KRS 131.131.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: The proposed amendment updates regulatory language to clarify information currently contained in the regulation.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The amendment will change this existing administrative regulation by distinguishing between the sales and use tax treatment of a mandatory gratuity and a voluntary gratuity, updating regulatory language to clarify previous guidance, and to provide guidance on the sourcing of forms.

(b) The necessity of the amendment to this administrative regulation: The amendment is necessary to remove outdated regulatory language to clarify the previous guidance contained and to specify the types of property sold.

(c) How the amendment conforms to the content of the authorizing statutes: See (1)(c).

(d) How the amendment will assist in the effective administration of the statutes: The proposed amendment updates regulatory language to clarify information currently contained in the regulation.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: All restaurants, their customers, their employees, and their vendors that access the amended regulation.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No actions are necessary to comply with the amendment.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no cost to comply with the amended regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Anyone who accesses the amended regulation will benefit from the updated information contained therein.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: There is no expected cost to implement the proposed amendment. Current staff and budgeted funding will absorb the implementation of this administrative regulation.

(b) On a continuing basis: There is no cost expected on a continual basis.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current departmental staff and funding will be used to implement and enforce this proposed amendment.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No additional funding or increase in fees is needed.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No fees are directly or indirectly established or increased by the proposed amendment.

(9) TIERING: Is tiering applied? (Explain why or why not): Tiering is not applicable as the proposed amended regulation will be applied equally to all entities impacted by it.

## FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 103 KAR 27:220

Contact Person: Lisa Swiger  
Phone Number: (502) 564-9526  
Email: Lisa.Swiger@ky.gov

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Finance and Administration Cabinet, Department of Revenue.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 131.130 and KRS 131.131.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? No revenues are expected to be generated by updating this administrative regulation.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None.

(c) How much will it cost to administer this program for the first year? No additional costs will be incurred in the first year of this regulation being in effect.

(d) How much will it cost to administer this program for subsequent years? No additional costs will be incurred in subsequent years.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: